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Board of Inquiry Interim Decision under
the ONTARIO HUMAN RIGHTS CODE, 1981

IN THE MATTER OF the Human Rights Code, 1981, s.o. 1981, c. 53, as amended.

AND IN THE MATTER OF the complaint made by Mr. G. Michael Roosma of Burlington, Ontario, dated August 29, 1985, as amended October 31, 1986, alleging discrimination in employment on the basis of creed, and constructive discrimination by Ford Motor Company of Canada Ltd. and The National Automobile and Agricultural Implement Workers of Canada, CAW Canada, Local 707.

AND IN THE MATTER OF the complaint made by Robert Weller of Mississauga, Ontario, dated September 5, 1985, as amended October 31, 1986, alleging discrimination in employment on the basis of creed, and constructive discrimination by Ford Motor Company of Canada Ltd. and The National Automobile and Agricultural Implement Workers of Canada CAW, Local 707.

Date of Hearings:	September 15 and 16, 1988
Place:	Toronto, Ontario
Before:	Peter P. Mercer
Appearances by:	D. Lepofsky, M. Bader and J. Tarlton for the Ontario Human Rights Commission
	L.A. MacLean, Q.C. and J. Moszynsky for the Respondent CAW Local 707
	R.G. Juriansz for the Respondent Ford Motor Company of Canada Ltd.

On July 24, 1987, I was appointed a Board of Inquiry by the Honourable William Wrye, then Minister of Labour, to hear and decide the complaint of G. Michael Roosma, dated August 29, 1985, as amended October 31, 1986, alleging discrimination in employment on the basis of creed and contructive discrimination against the Ford Motor Company of Canada Ltd. and the National Automobile and Agricultural Implement Workers of Canada, CAW Canada, Local 707. On the same date, I was also appointed a Board of Inquiry to hear and decide the complaint made by Robert Weller, dated September 15, 1985, as amended October 31, 1986, also alleging discrimination in employment on the basis of creed and constructive discrimination by the Ford Motor Company of Canada Ltd. and the National Automobile and Agricultural Implement Workers of Canada, CAW Canada, Local 707. After three days of hearings on preliminary matters, I issued an interim decision on November 20, 1987 which held the following: first, that s. 10 of the Ontario Human Rights Code, 1981 does impose a duty of proving accommodation short of undue hardship where a prima facie case of constructive discrimination on the basis of creed has been made out; secondly, that the National Automobile and Agricultural Implement Workers of Canada, CAW Canada, Local 707 could properly be joined as a respondent allegedly in violation of s. 4(1), 8 and 10 of the Ontario Human Rights Code, 1981; and thirdly, that the complaints do adequately allege a violation of the Ontario Human Rights Code, 1981.

Appeals from my preliminary decision of November 20, 1987 were launched by the Respondents and came before a three judge panel of the Divisional Court on July 4, 1988. At the outset of the hearing before the Divisional Court, the Human Rights Commission successfully brought a motion to quash the appeals on the grounds that s. 41(1) of the Code does not confer the right to appeal preliminary and interlocutory rulings of a Board of Inquiry. With the quashing of the appeals by the Divisional Court, the stay of

proceedings of the Board of Inquiry in this case was no longer in effect. Consequently, the hearing continued on September 15 and September 16, 1988, at which time argument was heard on three additional preliminary motions.

The first motion was put by Mr. Juriansz, counsel for the Respondent company, asking that each Complainant be excluded from the hearing room during the cross-examination of the other Complainant relating to the nature of that Complainant's religious belief and all related matters. After hearing argument, I denied the motion; under s. 38(2) of the Code, both Complainants are parties to the proceeding and, in the absence of any authority indicating why their exclusion would be justified, are entitled to be present. The following reasons relate exclusively to the decisions on two succeeding preliminary motions.

1. PARTICULARS

Section 8 of the Statutory Powers Procedure Act applies to boards of inquiry exercising a statutory power of decision under the Ontario Human Rights Code. This section provides: "Where the good character, propriety of conduct or competence of a party is in issue in any proceedings, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto".

On their face, the complaints reveal that "the propriety of conduct" of the Respondent Company and Union, through their officials, is in issue in these proceedings. Accordingly, as counsel for the Respondent Union as maintained, the Respondent is entitled to be furnished with "reasonable information of any allegations" with respect to the conduct of union officials. The issue, on this motion, is whether adequate particulars have been

provided by the Ontario Human Rights Commission. Mr. MacLean argues that, by the application of section 8 of the Statutory Powers Procedure Act, the Union is entitled to know "what it is being accused of imposing, in terms of a requirement, qualification or consideration, and when it imposed that, and how it did it, and who did it, the basic fundamentals of natural justice" (Transcript, Vol. III, p. 26). In support, he cites the decision of the Board of Inquiry in Walbar Machine Products (1980) CHRR D/228. In that case, Walbar argued that section 8 of the SPPA required the Commission not only to provide it with a statement of material facts but also to disclose the evidence on which it intended to rely in proof of its factual allegations; the Commission was agreeable to furnishing a statement of facts, but counsel took the position that "such matters as where and when an incident took place, giving rise to an allegation within the meaning of section 8 of the Act, represented a statement of evidence and not fact".

Professor Gorsky, Board Chairman, said the following:

> 2006 My view of s. 8 of the Act is that it was introduced to regulate one aspect of procedural natural justice which must be followed by certain tribunals including a Board of Inquiry appointed pursuant to s. 14(a)(1) of the Code. Whatever the scope of the information which must be furnished, its purpose is to define the issues and thereby prevent surprise by enabling the party against whom the allegations are made to prepare for the hearing. At the very least, s. 8 of the Act in order to fulfill this purpose would require that Walbar be furnished with a written statement of the material facts upon which the Commission intends to rely in support of the allegations with respect to the issues involving Walbar's good character or the propriety of its conduct. Such material facts should include when and where the alleged acts, which raised the issues, occurred, as well as the names of such persons who are referred to in the allegations, subject to the exceptions above noted.

The Chairman continued, at paragraph 2009: " ... I would also find that s. 8 does not contemplate a means of obtaining discovery of documents for inspection or statements of evidence by which it is intended to make out a case".

In support, Mr. MacLean also cited the Board of Inquiry decision in Cynthia Joseph v. North York General Hospital and College of Nurses of Ontario (1982), 3 C.H.R.R. D. 854. In that decision the Board Chairman, Professor Hunter, quoted Fairbairn v. Sage (1925), 56 O.L.R. 462 at 470, where Ferguson J.A. listed the purposes for which particulars are ordered:

(1) to define the issue;
(2) to prevent surprise;
(3) to enable the parties to prepare for trial;
(4) to facilitate the hearing.

Professor Hunter went on to conclude, having reviewed the particulars already provided, that they reasonably defined the issues and enabled the North York General Hospital to prepare adequately for the hearing.

Mr. Lepofsky, counsel for the Commission, provided a statement of particulars to Mr. MacLean, counsel for the Respondent Union, prior to the commencement of hearings on August 18, 1987 (Exhibit 3). Mr. MacLean quarrels with the sufficiency of paragraph 9 which reads as follows:

> 9. In their efforts to obtain some form of accommodation of their religious beliefs, the complainants sought the support of the respondent Union, of which they are members. The respondent Union was not prepared to file a grievance on behalf of the complainants arising out of the refusal of the respondent Ford to accommodate their creed. The respondent Union was not prepared to support the complainant's request to be accommodated with respect to their religion, and indeed has expressed opposition to certain accommodations which the complainants have

> proposed. As well, in discussions with the respondent Ford regarding proposals put forward by the complainants, by which their creed could be accommodated, the respondent Ford has indicated that certain proposals would not be feasible because the respondent Union would not go along with them. Accordingly, the refusal of the respondent Ford to accommodate the creed of the complainants is due at least in part to acts or omissions on the part of the respondent Union.

Mr. MacLean takes the position that "the statement does not indicate ... who was involved, when, where, or the particulars of the discussions, or transactions. The Respondent Union is left entirely in the dark as to what that is about" (Transcript, Volume III, p. 32).

Mr. Lepofsky replied by letter of September 9, 1988, to Mr. MacLean's request for further particulars. Mr. Lepofsky's position was that ample particulars had been provided for a substantial period of time, that no further particulars were required and that the request for further particulars was late. Nevertheless, Mr. Lepofsky appended a "Summary of Key Points in the Complainants' Evidence Regarding the Union" (Exhibit 7). Paragraph 1 of this summary, reads as follows:

> 1. Over the period of October/November 1984 up until the Complainants were terminated, they approached the following Union officials to request that the Union assist and cooperate in arranging an accommodation of their need to be relieved of work responsibilities on Friday nights: William Van Gaal, David Hall, Don Ferguson, Jim Donegan, David Hurley, Ted DeLuca, and a Mr. Headley.

Mr. MacLean's position is that "we have no idea whatsoever as to what is being referred to in paragraph 1, with respect to the time and place, when these individuals were approached, or what was said

to them, or what accommodation was sought, if any, and what they said". He has similar objections to the other paragraphs contained in the Summary provided by Mr. Lepofsky. He therefore asks for the ordering of further particulars or, in the default of their production, that the complaints be dismissed as against the Respondent Union. In conjunction with this request, Mr. MacLean asks for an Order requiring the Commission to provide information as to what they contend the trade union could have done, or failed to do, which would have effectively accommodated the Complainants.

I will deal first with this latter request. These Complainants allege constructive discrimination under section 10 of the Ontario Human Rights Code, 1981. In my interim decision of November 20, 1987, I concluded that section 10 does impose a duty of proving accommodation short of undue hardship where a prima facie case of constructive discrimination on the basis of creed has been made out. It follows logically from this conclusion that the Commission is required to render particulars of its prima facie case but not on the affirmative defence of reasonable accommodation where the burden shifts to the Respondent. In so determining, I am not at this time pronouncing on the scope or even the existence of any legal duty of reasonable accommodation on the Respondent Union, as that is not the proper subject of a preliminary ruling. I am therefore left with the question whether the Commission has provided adequate particulars of its prima facie case.

Mr. Lepofsky's position, on behalf of the Commission, is diametrically opposed to Mr. MacLean's. The Commission's view is that the Respondent Union has been rendered "ample, indeed, substantial particulars, well in excess of any obligation on the Commission, and well in excess of any required under either Section 8 of the SPPA, or under the principles of natural justice". Mr. Lepofsky supports this contention initially by reference to the two year period of investigation. There, the Commission

investigating officer went through a process of fact-finding and conciliation during which these matters must have been discussed with representatives of all parties. The Respondent Union would also have received a copy of her summary of investigation.

The issue of particulars had been raised during the initial hearings in August, 1987. According to Mr. Lepofsky, and counsel for the Respondents did not disagree, counsel for the Respondents were invited to Mr. Lepofsky's office to read his file. They were thus given full access to the documents in the file, subject only to those that were privileged or irrelevant, and these included the notes of the investigating officer from interviews as well as notes and summaries of the investigating officer from fact-finding and conciliation efforts which dealt with events in October and November, 1984, and beyond. Counsel were even invited to take photocopies if they wished. It is to be noted that this sort of documentary disclosure goes beyond what the case authorities, including Walbar Machine Products, provide for.

Mr. Lepofsky states that the particulars sought by Mr. MacLean are covered in these documents. Given the extensive disclosure made to the Respondent Union as described above, it is barely conceivable that the Respondent Union is not extensively aware of the prima facie case that the Commission will seek to establish. The request for further particulars is therefore denied.

I note, however, that Mr. MacLean and Mr. Lepofsky disagree as to whether certain information was contained in the Commission's file when it was examined by a representative of the Respondent Union over one year ago. To ensure that the Respondent Union has indeed received the benefit which the Commission asserts has been provided to it, and which I have held makes further production of particulars by the Commission unnecessary, I therefore order the Commission to give the Respondents access to its file on the same

basis as it did, extraordinarily, before. Specifically, on November 1 and 2, 1988, Mr. MacLean, or his representative and, if he wishes, Mr. Juriansz or his representative, will be entitled to attend at Mr. Lepofsky's office to examine the file except only for documents which the Commission fairly deems privileged or irrelevant to the case. The Respondents' representatives will also be entitled, as they were in the first instance, to take photocopies of documents in the file. This leaves a full six weeks for the parties to continue preparing their cases before we reconvene on December 14, 1988.

2. THE SCOPE OF THE COMMISSION'S CASE

As I have indicated above, and in my interim decision of November 20, 1987, the burden is intially on the Commission to establish a prima facie case of constructive discrimination and then shifts, if the prima facie case is established, to the Respondents, subject of course to any arguments that might be made regarding the existence of any legal duty to accommodate by the Respondent Union. It follows, therefore, that the burden is not on the Commission to show that the Respondents could reasonably have accommodated the Complainants. In the normal course of events, the Commission would attempt to establish its prima facie case, the Respondents would put in their defence and the Commission would call reply evidence to respond to that defence. In this case, however, Mr. Lepofsky finds himself in a dilemma.

The dilemma is easily stated. In attempting to establish its prima facie case, the Commission will call the Complainants. If the Commission attempts to anticipate the Respondents' possible defence of reasonable accommodation by examining the Complainants in-chief on that issue, Mr. Lepofsky is concerned that he will be vulnerable to a charge of case-splitting and a possible order

preventing him from recalling the Complainants in reply. If, on the other hand, he does not examine them in-chief on the issue of accommodation, but the Respondents exercise their right to cross-examine during the case-in-chief on that issue, he is afraid he is similarly vulnerable to being precluded from calling reply evidence in response. He therefore seeks a ruling in advance.

Counsel for the Respondents take the position that it would be inappropriate for a Board to make such an advance ruling. Mr. MacLean, in a letter to me of October 6, 1988, is particularly concerned that there be no compromise of his client's right to argue, at the close of the Commission's case-in-chief, that the Commission has failed to establish any prima facie case as against the Union.

During argument, Mr. Lepofsky advised that he was relying on a preliminary ruling by a Board of Inquiry on July 7, 1988, in the case of Gohm v. Domtar and Office and Professional Employees International Union. In that case, in which Mr. Lepofsky also acts for the Commission, the complaint is also one of employment discrimination based on creed there arising out of the alleged dismissal of the Complainant due to her unwillingness, as a Seventh Day Adventist, to work on a rotating Saturday shift. Mr. Lepofsky undertook to provide a copy of that ruling which he did in enclosing a copy of pages 45-61 of the transcript of the July 7th hearing with a covering letter of September 30, 1988.

It is unusual for such an advance ruling to be sought and perhaps equally unusual to cite, in support, a preliminary ruling from a similar case which is not reported because it is not concluded. However, as Professor Pentney notes at page 58 of the Gohm transcript, we are largely in "unchartered terrain". I deem it desirable to give guidance to the parties so long as neither of them is thereby unfairly advantaged or disadvantaged in this

adversary proceeding. In Gohm, the Commission sought an order permitting it to tender no evidence in-chief from the Complainant respecting reasonable accommodation. Professor Pentney ruled as follows:

> It seems to me that it is important to recall that in this proceeding I am not bound by the formal rules of evidence. Nor, save to a limited extent, am I bound by many of the rules that govern civil proceedings. But it seems to me that ... when Mrs. Gohm is on the stand, it would behoove all parties to engage in as full and complete an examination of her as possible, to get that aspect of the case out of the way. I don't see that that creates an unfair advantage in the respondents or should leave either of ... the complainant or the Commission, to have to try to anticipate fully the case that the respondents, particularly the respondent Domtar, is about to lead. I am prepared to allow the Commission ... to call evidence in rebuttal to meet specific points concerning possible other accommodations that were contemplated or were possible and that would include recalling Mrs. Gohm to meet those specific points if that comes up in their case. ...
>
> I'm prepared to rule that the Commission in rebuttal ... should be permitted to tender evidence to meet the specific evidence, particularly of other accommodations available to the company or the union, if Ms. Lennon's point is not accepted that there is no duty on the union, or to meet the specific issues of undue hardship that are led by the company. But I'm not prepared to rule at this stage that the ... respondent shouldn't cross-examine on those other issues of undue hardship. It seems to me that we are better off to get as much evidence in through Mrs. Gohm at this stage as we can.

I conclude that a similar ruling is appropriate in this case. Consequently, the Commission should adduce from the Complainants all their testimony on the issue of constructive discrimination and the duty to accommodate, in general, during its case-in-chief. Because the burden is on the Respondents to prove accommodation short of undue hardship where a prima facie case has been made out, the Commission will be entitled to recall the Complainants or

adduce other evidence in reply except to the extent that the reply evidence would simply reiterate earlier testimony.

Dated at the City of London, in the County of Middlesex, this 18th day of October, 1988.

Peter P. Mercer
Board of Inquiry